and investments which may be no greater than 30% of the total investments permitted Federal associations under paragraph (c)(1), found in subparagraph (G).

2. *Consumer Loans.* This power would be granted in section (1)(G)(ii) of the Board's proposed revised 5(c). You will notice that all categories of investment in subparagraph (G) are subject to the limitation that aggregate outstanding investments under that subparagraph may not exceed 30 per centum of the total permissible investments under paragraph (c)(1).

3. *Construction Loans.* Construction loans would be permitted under subparagraph (A) in connection with residential real estate loans. Construction loans would also be permissible investments under such categories as subparagraph (G)(v) relating to community conservation, development or improvement. Present 5(c) limits construction loans by location and, in amount, as a function of assets or of surplus, reserves and undivided profits.

4. *Community Welfare and Development Loans.* As discussed above, loans of this type would be permitted under subparagraph (G)(v), subject to the 30% limitation. The revision builds upon and expands the existing powers to invest for such purposes found in present section 5(c) in the authority to invest in State housing corporations and urban renewal areas.

5. *Commercial Paper and Corporate Debt Securities.* These investments would be permitted under subparagraph (G)(viii) subject to the 30% limitation.

6. *Federal, State, and Municipal Securities.* Under the Board's revision, investments of this type would be permitted under subparagraph (B)(1). Investments would also be permitted under subparagraph (G)(iv) where these investments were not backed by the United States, a State or political subdivision of a State, including any department or agency of the foregoing. Present Section 5(c) generally authorizes such investments.

7. *Deposits in Insured Institutions and Investments in Certain Securities.* Under the Board's revision, deposits in insured institutions would be permitted under subparagraph (1)(C). Investments could also be made in bankers' acceptances of institutions insured by an agency of the United States. This provision would clarify existing authority.

8. *Liquidity Investments.* The Board's revision of Section 5(c) would make provision for investments necessary for liquidity purposes under Section 5A of the Federal Home Loan Bank Act under subparagraphs (1)(B)(1) and (1)(C). It is intended, with respect also to paragraph (1)(C), that investments in Federal funds would be permitted.

9. *Service Corporation Investments.* The proposed amendments would permit investment in service corporations where the investment would not thereupon exceed the greater of 1 per centum of the assets of the association or 25 per centum of its net worth. This is a change from present Section 5(c) which uses only a 1 per centum of assets test.

10. *Trust and Other Fiduciary Powers.* A new paragraph (c)(2) would be added authorizing Federal associations to act in trustee and other fiduciary capacities. Present Section 5(c) generally limits Federal associations to acting as trustee or custodian only for investments in savings accounts in connection with individual or self-employment retirement accounts or plans.

On behalf of the Federal Home Loan Bank Board, I respectfully ask you to lay the proposed amendments to S. 1267 before the Senate. An identical bill is being transmitted to the Speaker of the House of Representatives.

Sincerely yours,

CHARLES E. ALLEN,
General Counsel.

CRIMINAL JUSTICE REFORM ACT OF 1975—S. 1

AMENDMENTS NOS. 928 THROUGH 933

(Ordered to be printed and referred to the Committee on the Judiciary.)

Mr. MOSS submitted six amendments intended to be proposed by him to the bill (S. 1) to codify, revise, and reform title 16 of the United States Code; to make appropriate amendments to the Federal Rules of Criminal Procedure; to make conforming amendments to criminal provisions of other titles of the United States Code; and for other purposes.

Mr. MOSS. Mr. President, on August 1, I introduced several amendments to Senate bill 1, the Criminal Justice Reform Act of 1975, a bill which I cosponsored earlier this year. All of those amendments were intended to make chapter 11 of the bill reflect more accurately the many years of congressional and judicial action regarding the prosecution of offenders, who by their acts do damage or injury to the security of this Nation or its allies.

Mr. President, when I originally cosponsored S. 1, I realized at that time there were certain deficiencies in the bill and I announced that my cosponsorship would include amendments to better bring the bill in line with the requirements of the Constitution and justice. In that regard, I am introducing today additional amendments to chapters 5 and 10 of Senate bill 1.

As a cosponsor of this measure, I feel an obligation to participate very actively in the legislative considerations of the Criminal Justice Reform Act of 1975, and I intend to pursue that obligation very actively. I urge the Judiciary Committee to review these amendments very carefully.

The first amendment will amend section 511—Time Limitations.

The current time limitations for institution of criminal prosecutions are set forth at 18 U.S.C. sections 3281, capital offenses, and 3282, offenses not capital. Any indictment or information must be found or instituted within 5 years following the commission of the offense or prosecution is barred. S. 1 makes these same provisions. But the time has come to recognize that the statute of limitations should be applied to take cognizance of the offense committed. Since offenses are graded, it would seem propitious to also grade the applicable limitations. S. 1 already does this in a limited way by separating infractions and making the applicable period 1 year.

The amendment would leave the limitation for felonies at 5 years, and reduce the statute of limitations for misdemeanors to 3 years. The philosophy behind a statute of limitations, to insure that indictments and informations will not be brought on State crimes, the prosecution of which most often is not the best utility of a court's time. With that in mind it is only reasonable that because a misdemeanor is not considered to be as offensive to society as a felony the limitation for prosecution of the crime should consider the seriousness of the offense and reduce the statute for a misdemeanor offense.

The next consideration in this amendment is the provision for continuing offenses. By inference, there is within the provisions for acts of conspiracy question of concealment which would be a natural objective of any conspiracy. This would make conspiracy an eternal crime because the conspirators are hiding the conspiracy of an uncommitted act forever. The courts are currently split on whether concealment is a separate objective of conspiracy, thereby increasing the duration of a conspiracy. Although by analogy—misprison of a felon, harboring a fugitive—active concealment is usually required for the offense to occur. S. 1 defines conduct as "any act, any omission, or any possession," and would thereby bring concealment within the time limitation extension provided for. Also, the dichotomy between active and passive is usually an artificial one, without any objective certainty. One will inevitably actively conceal one's crime. In addition, the requirement that the coconspirators agree to the concealment will offer no salvation. All conspirators agree, explicitly or implicitly, to conceal their offenses; the act of any one conspirator will bind the others if it is reasonably foreseeable. These requirements, of agreement and active concealment, have no objective validity.

All crimes have as an objective secrecy and concealment—no criminal desires to be caught and conspiracy is no exception. But to raise its status to a legal objective of a conspiracy, thereby continuing the offense, insures that conspiracy will have no statute of limitations and prosecutors can and will always prosecute for concealment of a conspiracy when the applicable statute of limitations for the crime have expired. If such is the intent of Congress then we should specifically state that conspiracy, like any capital offense, shall have no limitation on the institution of a prosecution.

Also, within this amendment is a change in the limitation for prosecution for failing to register. As currently drafted, the statute of limitation does not begin to run until the individual registers, thereby insuring that the offense will have no limitation. The individual would have to proclaim his crime, by registering late, in order for the statute to begin running. If an individual has a duty to register by a certain date, his crime consists in not registering on that day—once the crime has been committed the applicable period should start to run without each succeeding day of failing to register becoming an additional day of criminal behavior. The philosophy of a statute of limitations should require that the time starts to run when the crime is committed and if this is a known legal

its forthcoming markup of S. 1267 and report its recommendations to the full Senate as soon as possible. I ask unanimous consent that the text of the amendment and the Board's descriptive letter of transmittal dated September 24, 1975, be printed in the RECORD.

There being no objection, the amendment and letter were ordered to be printed in the RECORD, as follows:

AMENDMENT No. 927

On page 21, beginning at line 17, through page 24 ending at line 13, strike all of subsections 301(a) and (b) and insert in lieu thereof the following subsections 301(a) through (d) and reletter subsections 301(c), (d), and (e) at lines 14, 19 and 25 respectively on page 24 as 301 (e), (f), and (g):

SEC. 301(a). Subsection (c) of section 5 of the Home Owners' Loan Act of 1933, as amended (12 U.S.C. § 1464(c)), with the exception of the fifteenth paragraph thereof, is amended to read as follows:

"(c)(1) In implementing the provisions of this subsection, the Board shall cause such associations to be primarily housing lenders. An association may, to such extent, and subject to such rules, regulations, definitions, and orders, as the Board may prescribe from time to time, invest in, sell, service, or otherwise deal with, the following loans and other investments. As used in this subsection, the term 'loans' includes obligations and extensions or advances of credit; and any reference to a loan or investment includes an interest in such a loan or investment.

"(A) loans secured by or made with respect to or for the acquisition, development, construction, improvement, repair, equipping, or alteration of real property which comprises or includes or is to comprise or include one or more homes or other dwelling units (including condominiums, cooperatives, and mobile homes):

"(B) loans to, or other securities or instruments issued by, or having the benefit of any insurance, guaranty, or assistance of, any one or more of the following:

"(i) the United States, a State or political subdivision of a State, including any department or agency of any one or more of the foregoing;

"(ii) the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, a Federal Home Loan Bank, or any other instrumentality of the United States, a State or political subdivision of a State, created to further any housing program;

"(iii) the National Housing Partnership Corporation and any partnership, limited partnership, or joint venture formed pursuant to sections 907(a) or 907(c) of the Housing and Urban Development Act of 1968, as heretofore or hereafter in effect; and

"(iv) the President of the United States, as authorized under sections 221, 222, or 224 of the Foreign Assistance Act of 1961, as now or hereafter in effect;

"(C) deposits in, other loans to, and bankers' acceptance of, any financial institution the accounts of which are insured by an agency of the United States;

"(D) loans or other investments secured by any type of loan or other investment authorized under the preceding subparagraphs (A) through (C);

"(E) loans secured by accounts in the association;

"(F) real property a substantial portion of which is used or will be used as a home office or other office facility of the association (or securities of a corporation substantially all of whose activities consist of the ownership or operation of such real property); and

"(G) the following additional loans and other investments, but no association may make an investment under this subparagraph (G) if its aggregate outstanding investments under this subparagraph (G) would thereupon exceed 30 per centum of its total investments under this paragraph (c)(1):

"(i) loans for the payment of expenses of college, university, vocational school or other education;

"(ii) consumer loans;

"(iii) loans secured by or made with respect to other real property;

"(iv) to the extent not referred to in the preceding subparagraph (B), loans to, or other securities or instruments issued by, or having the benefit of any insurance, guaranty, or assistance of, the Student Loan Marketing Association, any other instrumentality of the United States, or any instrumentality of a State or political subdivision of a State;

"(v) loans or other investments for purposes related to community conservation, development, or improvement;

"(vi) loans or other investments secured by loans or other investments authorized under the preceding provisions of this subparagraph (G);

"(vii) loans to, or other securities or instruments issued by, any corporation incorporated under the laws of any State or of the United States, substantially all the activities of which are reasonably related to the activities of associations, but no association may make an investment under this subdivision (vii) if aggregate outstanding investments under this subdivision (vii) would thereupon exceed the greater of one per centum of its assets or 25 per centum of its net worth; and

"(viii) commercial paper and other corporate debt securities.

"(H) Any institution which has converted to a Federal association pursuant to subsection (i) of this section 5 may, to the extent permitted by the Board and subject to such terms and conditions as may be imposed by the Board:

"(i) make investments of a type permitted under subparagraph (G) of this paragraph (c)(1) without regard to the 30 per centum of assets limitation contained in said subparagraph (G) for a period not to exceed five years from the effective date of such conversion;

"(ii) retain, but not increase, investments which were lawful immediately prior to the effective date of such conversion where such investments are not authorized under this paragraph (c)(1) and are not included as an authorized investment for the converted association pursuant to subsection (a) of this section 5; and

"(iii) in the case of a mutual savings bank converting to a Federal association, continue and retain those investments included within subsection (a) of this section 5 to the extent permitted by said subsection, except that the Board may include any of such investments which are of a type authorized by subparagraph (G) of this paragraph (c)(1) within the 30 per centum of assets limitation contained in said subparagraph.

"(2) To such extent, and subject to such rules, regulations, definitions, and orders as the Board may prescribe from time to time, an association may be and act as executor, administrator, custodian, testamentary trustee, or trustee of a living trust, or in any other fiduciary capacity, for any estate, trust, or assets owned by, or created, existing or organized for the benefit of any individual or individuals, or as custodian or trustee of any individual or self-employment retirement account or plan, and all funds held in any such capacity by any such association may be commingled for appropriate investment. An association may also act as custodian or trustee with respect to any securities issued or guaranteed by any financial institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation or issued or guaranteed by an affiliate of one or more of such institutions. An arrangement which would otherwise be a trust having an association as trustee shall, for the purposes of this paragraph (2), the Internal Revenue Code of 1954, or any other provisions of law now or hereafter in effect, be considered to be a trust having an association as trustee without regard to the fact that all or part of such arrangement consists or has consisted of one or more deposits. One or more associations may establish, maintain, or invest in common funds. An association shall not, by reason of any service, activity, or business authorized by this paragraph, be considered not to be entitled to any exemption or favorable treatment, under any tax statute or other statute, it would have or receive in the absence of such service, activity, or business."

(b). Section 2 of the Home Owners' Loan Act of 1933, as amended (12 U.S.C. § 1462), is amended by adding at the end thereof the following new subsections:

"(e) The terms 'real property' and 'real estate' include leaseholds.

"(f) The term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, the Canal Zone, Guam, American Samoa, and any territory or possession (including any trust territory) of the United States. The provisions of this Act shall apply to any State as herein defined".

(c). Section 7 of the Home Owners' Loan Act of 1933, as amended (12 U.S.C. § 1466), is repealed.

(d). The fifteenth paragraph of subsection (c) of Section 5 of the Home Owners' Loan Act of 1933, as amended (12 U.S.C. § 1464 (c)), is designated paragraph (c)(3).

FEDERAL HOME LOAN BANK BOARD,
Washington, D.C., September 24, 1975.

Hon. NELSON A. ROCKEFELLER,
President, U.S. Senate,
Washington, D.C.

DEAR MR. PRESIDENT: I transmit herewith on behalf of the Federal Home Loan Bank Board a draft of proposed amendments to S. 1267, the "Financial Institutions Act of 1975", for the purpose of amending proposed amendments to Section 5(c) of the Home Owners' Loan Act of 1933, as amended. The draft proposed amendments would strike the proposed amendment to Section 5(c) appearing in S. 1267 and substitute therefor a revised Section 5(c) for the purposes outlined below.

S. 1267 would leave intact the complex and cumbersome provisions of existing Section 5(c) of the Home Owner's Loan Act but would substantially expand the lending authority permitted Federal savings and loan associations under that section. It is the purpose of the proposed amendments to S. 1267 transmitted herewith, to simplify existing 5(c) while accomplishing this objective. There are several specific areas treated by the Board's revision which I would like to bring to your attention.

1. *Real Estate Loans.* The Board's revision would specifically divide real estate loans into two categories: the first relates to residential real estate loans, which would be placed in subparagraph (A), and would be without limitation; the second are other real estate loans, which would be placed in subparagraph (G)(iii) and be subject to a 30% limitation discussed below. You will observe, that the Board's revision of Section 5(c) would make a basic division between investments which may be unlimited in amount contained in subparagraphs (A) through (F)

duty an enforcement effort should discover the offense within that time. There is no overriding State interest which gives reason to require the person to have the possibility of prosecution over his head in perpetuity.

This amendment next changes the time limit for reinstitution of prosecution. S. 1 follows current law in providing 6 months for reinstitution of prosecution if it was originally dismissed for a defect in the complaint itself. However, 6 months is too much time to be allowed for the reinstitution of a prosecution, even if a new grand jury need be called. If the Government is serious about instituting a prosecution after a dismissal and after the statute of limitations has run, it can and should do it within 60 days of the dismissal. This amendment also will cause greater efficiency in the administration of justice.

I must add that it is explicit within the amendment that such an extension of the applicable limitation period will only apply when there is a defect or error on the face of the complaint, indictment, or information, as the current law states. The word "insufficiency" connotes evidence, and any dismissal based upon evidence may not be reinstituted.

The final part of this amendment is to change the tolling of the statute of limitations. S. 1 as drafted parallels current law. There is no reason to toll the period based upon the absence of the defendant unless it impedes the investigation of the crime. An indictment may be found, or an information filed in the absence of the defendant, and that will solve the limitation problem. The time limitation only requires the institution of criminal proceeding within the applicable period, it does not require that the defendant be brought to trial. The absence of the defendant is not a reason to find the indictment or file the information.

The second amendment will change section 522—Insanity.

The defense of insanity is not set forth in any statute, nor has it been precisely defined by the judiciary. The Supreme Court has recognized the defense, but has never set about to define it. See *Davis* v. *United States,* 160 U.S. 469 (1895) (Burden of Proof). Rather it has allowed the lower courts freedom to fashion various rules, and experiment with them, rather than solidifying the Federal court system with any one definition. However, the defense is probably constitutionally required. See *Robinson* v. *California,* 371 U.S. 905 (1962) (Dictum).

The definition in S. 1 requires that the defendant must lack the requisite state of mind for the commission of an offense as a result of a mental disease or defect. This would essentially negate the defense of insanity, and at the least codify the earliest test used in judicial history. If the defendant lacks the requisite state of mind, he is not guilty; but if he does so as a result of insanity, he is insane. The defense of insanity means more than that.

There have been, and are currently, various tests for legal insanity. The earliest was the "wild beast" theory, that the defendant was responsible for his actions unless he was wholely deprived of understanding and memory to such an extent as to not know what he was doing. As psychology developed, and recognition of incompetent individuals grew, an expanded definition arose, in the famous McNaghten case. The test enunciated there, known as the right/wrong test, was whether the defendant was laboring under such defect of reason, from a disease of the mind, as to not know the nature and quiry of the act he was doing; or if he did know, that he did not know that what he was doing was wrong. This test is still the sole test in most common law jurisdictions, and in some States by statute. Most courts interpret the right and wrong in the test as being moral right and wrong, although some hold it to be the legal right and wrong. This test has been often attacked as being based on outmoded and erroneous psychological theories, and as concentrating solely on defects of reason and not emotion.

Another test, which is used as a supplement to the McNaghten rule, is the irresistible impulse test, or the inability to control one's conduct. This test states that notwithstanding that the defendant could comprehend the nature and consequences of his actions, and knew that what he was doing was wrong, nevertheless if he was forced to its execution by an impulse which he was powerless to control as consequence of a disease or defect of the mind, his conduct will be excused.

The American Law Institute, in its Moral Penal Code, proposed another test which has been adopted in a number of States. The test states that a defendant is not responsible for criminal conduct if "at the time of such conduct as a result of mental disease or defect he lacks substantial capability to either appreciate the criminality—wrongfulness—of his conduct or to conform his conduct to the requirements of law."

Another test which has had limited success is variously known as the Durham Rule, the "product" test or the New Hampshire Rule. It states that a defendant is not responsible for his criminal conduct if his unlawful act was the product of a mental disease or defect. The test as to whether the conduct is a "product" is legally the "but—for" test often encountered in the theory of tort law and is left to the jury to determine. The court merely regards cognition, volition, and capacity to control behavior—that is knowledge, will and choice—as the three essential elements of sanity, which the Government must prove. Any instruction to the jury on the defense of insanity must have the jury find an all three elements to prove sanity.

The Federal courts are currently divided on the tests, and variously follow the McNaghten test; the McNaghten test supplemented by the irresistible impulse test; see *Pollard* v. *United States,* 282 F2d 450 (6th Cr. 1959), rehearing denied, 285 F2d (6th Cir. 1960); the Model Penal Code Test, see, *United States* v. *Freeman,* 357 F2d 606 (2d cir. 1966) (rejecting McNaghten for Model Penal Code); *Black* v. *United States,* 269 F2d 38 (9th cir. 1959), cert. den. 361 U.S. 938 (1960) (rejecting Durham for Model Penal Code); also second, fourth, and fifth circuits; a modification of the Model Penal Code known as the Currents Test, *United States* v. *Currens,* 290 F2d 751 (3d cir. 1961); the Three Elements Test, *Duskey* v. *United States,* 295 F2d 743 (8th cir. 1961) cert. den. 368 U.S 998 (1962); or the Durham rule as modified.

The formulation of insanity as a defense as presently drafted in S. 1 would essentially return the definition of insanity to the "wild beast" test. This is because in order to negate the mental elements in all but the public welfare offense—no mental requirements—such as known conduct, the defendant would have to be totally without understanding. That test predates McNaghten, which is itself criticized for being based on outmoded psychological thinking.

There is currently great controversy over what is the proper formulation of the insanity defense. The debate rages among psychiatrists and psychologists as to what is insanity, both legal and nonlegal definitions; and what constitutes incompetence. Legal theorists debate over the purposes of the insanity defense and the implicit fault concept in criminal laws.

The Supreme Court has taken the position that because the state of the art has not developed sufficiently, both in the law and in medicine it is too early to definitively define the defense. The better way is to allow experimentation to develop the most effective and proper formulation. In the Federal courts the most popular formulation is the Model Penal Code, but in the States the McNaghten, supplemented by the irresistible impulse test, is the most common. But a return to the earlier test, before the development of modern psychology, as S. 1 attempts, would reject the last 300 years of judicial and psychological history and learning. It is still too early to solidify the definition of insanity and until there is at least some moderate form of agreement the defense should not be codified. For that reason my amendment will eliminate from S. 1 a definition of the defense of insanity.

The third amendment changes section 551—Unlawful Entrapment.

The defense of entrapment to a Federal prosecution is judicially created. It is not presently set forth in any statute. The Supreme Court's latest statement of the defense is set forth in the case of *United States* v. *Russell,* 411 U.S. 423 (1973), which upheld the previous two entrapment cases of *Sorrells* v. *United States,* 287 U.S. 435 (1932), and *Sherman* v. *United States,* 356 U.S. 369 (1958). The Court stated that the defense will apply if the defendant was not predisposed to commit the offense and that the Government planted the intent to commit the offense in the mind of the defendant. Once this prior state of mind has been proven by the defendant the Government cannot thereafter punish the defendant for his unlawful conduct. The Court continued that the basis for the defense is that Congress did not intend that its criminal laws should be applied to such an individual who was previously, before the Governmental interference, not intending to break any law.

This formulation has become known as the subjective test, and was persuasively criticized by the dissents in Russell and by commentators thereafter. The competing formulation of the entrapment is known as the objective formulation, and was asserted by the minorities' opinions in the cases set out above.

There are basically three objections to the subjective formulation. The first is that it allows into evidence previously irrelevant and hearsay evidence on the predisposition of the defendant. To convict an individual the Government must show conduct on the part of the defendant—the actus reus—and also the requisite mental state of the defendant regarding his conduct and the consequences of the conduct—the mens rea. The subjective formulation raises the question of the origin of the mens rea of the defendant, and makes that origin the sole criterion of the defense.

The second objection is that the defense is all but disallowed for any individual who has been charged or convicted of any previous offense, or who is a "criminal." The evidence of any passed criminality appears almost conclusively as showing that the intent to commit the crime arose within the defendant and that the Government merely allowed the opportunity for the individual to commit the crime; that is, did not entrap him. The agent's conduct toward people with past records, or with bad reputations, will therefore be less cautious and will not comport with a democracy's ideals of how its members should be treated by the police. Although it is true that criminals should be caught swiftly and dealt with by the courts, until that individual engages in specific conduct he should not be treated any differently than any other individual. Just because an individual has a past record or bad reputation he should not lose his rights to unwarranted police interference and persecution.

The third objection is more philosophical, but subsumes the other two objections. It is that the thrust of the entrapment should be an objective one, that the Government should not be allowed to follow certain courses of conduct in order to ensnare individuals into acting unlawfully for the purpose of gathering evidence of the unlawful activity. The focus of the defense should be the conduct of the law enforcement officers and the agents, and the propensity of their acts to cause criminal conduct. Some commentators have stated that if the conduct of the officers is flagrant enough, that the due process clause would bar a conviction. However, they state no cases in support of that position.

Entrapment is an affirmative defense. The defendant, under the subjective formulation, must prove by a preponderance of the evidence, that he had no predisposition to commit the offense and that the intent to commit the crime was implanted in him by Government agents. *Martinez* v. *United States*, 373 F2d 810 (10th cir. 1967). The defendant must first show his character as being law-abiding, and then prove that the conduct of Government did more than simply provide an opportunity for the defendant to commit a crime. The defendant must also show action by the Government to originate and implant in the defendant an intent to act unlawfully. The Government must merely show, by hearsay evidence, rumor and suspicion, that likely as not—defeat the defendant's burden of proof by a preponderance of the evidence—the defendant had a predisposition to criminal conduct.

By my amendment the defense is based on the American Law Institute's Model Penal Code, proposed Final Draft 1962, section s.13. It is an objective formulation, the thrust of which is the law enforcement officer's conduct and the probable consequences of that conduct. In order for the defense to arise, the officer must first induce or encourage the individual to engage in unlawful conduct. There are then two standards to judge the effects of the inducement to determine if the defense is applicable. The first is if the official knowingly makes false representations that the conduct will be legal if engaged in by the individual, then arrests them for the conduct. An example of this is the Cox against Louisiana case, where a sheriff told some demonstrators that in order for their protests to be legal they had to move to a parking lot nearby. When they did so they were arrested and convicted.

The second standard is that the methods of persuasion used by the officials in getting the defendant to engage in unlawful conduct create a substantial risk that the conduct will be engaged in by others than those ready to commit it. Any question of predisposition goes to the predisposition of the community at large, and will not foreclose the defense to individuals who have a "bad reputation." Individuals who commit crimes should be dealt with swiftly, but law-enforcement officials in the investigation of crimes and apprehension of criminals should be held to certain standards of conduct, and that standard is the very base of the defense of entrapment.

My amendment precludes the defense when the crime charged is causing or threatening bodily injury. Such conduct is clearly beyond social acceptability, and any time police conduct causes such crimes the defense should be governed by the standards of the defense of duress or the defense of protection of persons or property, which defenses are set forth in S. 1 at section 531, 542, and 543, respectively.

Mr. President, those are my amendments for chapter 5 of the Criminal Justice Reform Act of 1975. The first amendment for chapter 10 will change section 1001—Criminal Attempt.

In the statutes currently in force, there is no criminal attempt statute of general applicability. There are, however, crimes that are explicitly defined to include attempts. These are 18 U.S.C. 751 and 752—escape or assisting escapes; 18 U.S.C. 32 and 33—destruction of aircraft, motor vehicles or their facilities; 18 U.S.C. 351—congressional assassination, kidnapping and assault; 18 U.S.C. 1113—murder and manslaughter; 18 U.S.C. 1751—Presidential assassination, kidnapping, and assault; 18 U.S.C. 1751—actions at the residence of our President; 18 U.S.C. 1892—wrecking trains; 49 U.S.C. 1492—aircraft piracy; and 40 U.S.C. 193(h)—actions on Capitol Grounds. This section of S. 1, as an attempt statute of general applicability, is a significant extension of the Federal Criminal Law.

The Supreme Court has not heard a case on criminal attempt and the lower courts are not in total agreement on the common law tradition of the crime of attempt. One of the basic problems of an attempt statute is to define the line between mere preparation to commit an offense, which is not punishable, and conduct constituting "attempt." The bill as drafted states that the conduct must "indicate his intent to complete" the crime. This is a very broad standard, as almost any act of preparation may "indicate" his intent. The law as presently drafted is very close to allowing prosecution for only an "evil intent" with a minimal conduct requirement—conduct that poses little or no threat to society. Therefore, my amendment would require that the defendant's conduct "unequivocably" indicate his intent—thereby strengthening the requirement that there be conduct that poses a threat to society.

S. 1, in its present form, precludes the defense of legal or factual impossibility. Although some commentators have recommended that these defenses be precluded, it is urged that this not be done. If precluded, the criminal laws would allow prosecution for simple wrongful intent, as the individual's conduct cannot amount to a crime. This area has always been a law professor's darling, and numerous famous hypotheticals come to mind. The person who thinks he is a witch doctor and can kill people by sticking pins in a doll—he has the intent, his actions indicate his intent, but there is factual impossibility of consummation. Should this be punished as attempted murder? The Lady Blackmore hypothetical is another well known example. Lady Blackmore returns to her native England with some fine French silks. She believes that there is a law requiring a duty to be paid on them, which she does not want to pay. She therefore hides the silks in an effort to smuggle them into the country. They are discovered on her entry but it turns out there is no law requiring a duty to be paid on them. She has the intent, and her actions indicate her intent, but there is legal impossibility of consummation of the crime. Should this be punished as attempted smuggling? Under S. 1 both of these hypotheticals should be prosecuted.

The hypotheticals point out the reasons for the defenses. Without these defenses conduct that cannot amount to a crime is punishable, because of the evil intent. The reason for there being a crime of attempt is to allow police officers to arrest individuals before they complete a crime—catching them in the act—and to punish individuals when the executed plans are stopped just short of completion, through the intervention of some other force. Certainly there is a need for the codification of such a crime, such codification allows the prevention of an injury to society, and eliminates the

requirement of after the fact correction of injury if correction is possible.

The fifth amendment I am introducing today, and the second amendment to chapter 10, will change section 1002—Criminal Conspiracy.

The current conspiracy statute is set out at 18 U.S.C. section 371, and states that if two or more persons conspire to commit an offense against the United States, or to defraud the United States, and any person who do any act to effect the object of such conspiracy, they can be punished by up to 5 years in prison plus a fine, unless the object of the conspiracy is a misdemeanor, and then the punishment is the maximum for the misdemeanor. Conspiracy is another of the inchoate crimes and has engendered a great deal of controversy over the years. The courts, in dealing with the statute, have maintained and engaged the common law traditions and requirements of conspiracy, and have also required a specific intent on the part of any defendant to commit the objective of the conspiracy.

Section 1002 of S. 1 reflects of those requirements, but leaves the conduct element—besides the agreement—loosely defined. My amendment will make it clear that the conduct must be specifically in furtherance of the conspiracy, thereby maintaining the requirement that there be a specific threat to society, not just the possibility of further concerted action, and the requirement that there be a specific intent to effectuate the conspiracy by engaging in conduct.

As presently drafted, S. 1 defines an "objective" of a conspiracy to include "any measure for concealing, or obstructing justice in relation to, any aspect of the conspiracy." This definition will accomplish two things, it will expand the scope of conspiracy and make it a crime of perpetual duration.

The act of concealment is an objective and an element of all criminal activity—nc one wants to be caught. To make this capable of being the objective of a conspiracy would negate the need for almost all other crimes. If a group of people observed a mugging, and they "constructively" agreed not to summon the police, they could be guilty of conspiracy if they went home and did not call the police. Although their conduct is reprehensible, it should not be punishable as conspiracy. Conspiracy is an inchoate crime, and to many people an objectionable crime. At least the crime should be defined circumspectually. To allow silence as an objective of a conspiracy, and thereby allow criminal sanctions, goes beyond the reason for a crime of conspiracy—to punish the agreement to commit unlawful concerted activity when there is conduct to effectuate the agreement.

This section is very much like the question of concealment which I addressed earlier when discussing my amendment to section 511. Much of the analysis stated there must be restated here. As presently drafted the section provides that the crime will have no end, as the participants of a conspiracy will not endeavor to come forward and prove they committed a crime, they will continually keep silent. Although the courts have usually required that there be active concealment—as in the case of harboring a fugitive—such cannot be assumed and should be made explicit. The bill defines "conduct" as including "any act, any omission, and any possession," at page 34, line 38, which raises doubts as to that interpretation. This provision, then, effectively removes the statute of limitations on conspiracy, and will possibly engender the use of conspiracy trials whenever the statute of limitations has run on some other crime. The amendment therefore returns the definition of conspiracy to its more commonsense meaning—the act of conspiracy to commit the offense, the immediate flight therefrom, and the division of spoils.

In the affirmative defense set forth in S. 1, the defendant, in order to absolve himself of criminal liability, must voluntarily and completely renounce his criminal intent, and must also prevent the objective of the conspiracy from occurring. This is too great a burden to force upon the individual. He should be required to voluntarily and completely renounce his intent, but should not be absolutely liable if the crime is completed. He should be required at the most to act in a manner reasonably designed to cause the prevention of the crime. As currently drafted, if an individual renounced his criminal intent and went to the police, who either were unable to prevent the crime through some fortuitous event, or decided to allow the crime to occur in order to apprehend the criminals for their conduct, the individual would be prevented from asserting his worthy conduct as a defense, but rather would be liable with the others.

In the defense precluded subsection of section 1002 the basic common law rules have been maintained, with one objectionable exception. This subsection would preclude the defense that because all of one's alleged coconspirators have been acquitted, the Government can still proceed against the remaining individual. By my amendment the Government would, and should, be stopped from denying the earlier verdict. This provision goes against the common law of conspiracy, the current law of conspiracy, and the spirit if not the letter of the most recent double jeopardy decision of the Supreme Court, *Ashe* v. *Swenson*, 1970, which was cast in terms of estopple. If this defense were to be precluded, an individual could be found guilty of conspiring with himself, because all his alleged coconspirators would have been found innocent. Such a series of attempted prosecutions would be more closely approximate harassment rather than a search for just retribution against criminals.

As to the punishment for this offense, the current statute sets 5 years if the conspiracy was to commit a felony, and the possible term for the misdemeanor if the conspiracy was to commit a misdemeanor. S. 1 would set the punishment at the punishment for the objective of the conspiracy. This, it is urged, does not adequately equate the punishment with the offense. The threat to society from conspiracy is unlawful concerted activity, but it should be presumed that in a conspiracy prosecution the crime has not been completed. To hold an individual responsible for agreeing to commit a crime to the same degree as one who completed the crime does not comport with seriousness of their actions. My amendment would set the punishment at one-half the punishment of the objective of the conspiracy, which is sufficient to express the danger in concerted activity. The provision in some instances—Class A, B, or C felonies—would give longer prison terms, and in others a lighter sentence. The attempt is to equate the seriousness of the conduct with the punishment, which present law does not do, and which S. 1 fails to recognize.

The sixth amendment I am submitting today will change section 1003—Criminal solicitation.

There is currently no solicitation crime of general applicability. The only solicitation crime regards the soliciting of a bribe or public graft.

S. 1 basically sets forth the common law crime of solicitation. The affirmative defense, which allows for repentance of the act, although not accepted in all jurisdictions that have solicitation as a crime, is deemed appropriate as this is the third of the inchoate crimes—attempt and conspiracy being the other two—and as this is an extension of current Federal law. However, the requirement the defendant "prevent" the commission of the offense is too great a burden to place on the offender. My amendment will provide a more just standard which will require that the defendant takes reasonable steps to prevent the commission of the offense and acts to insure that he is not criminally liable if after his repentance and actions some fortuitous circumstance cause the commission of the offense.

NATURAL GAS EMERGENCY ACT OF 1975—S. 2310

AMENDMENT NO. 934

(Ordered to be printed and to lie on the table.)

Mr. HOLLINGS (for himself, Mr. GLENN and Mr. TALMADGE) submitted an amendment intended to be proposed by them, jointly, to the bill (S. 2310) to assure the availability of adequate supplies of natural gas during the period ending June 30, 1976.

ADDITIONAL COSPONSORS OF AMENDMENTS

AMENDMENT NO. 876

At the request of Mr. ABOUREZK, the Senator from Utah (Mr. Moss) and the Senator from Washington (Mr. JACKSON) were added as cosponsors of amendment No. 876, intended to be proposed to the bill (S. 1816) the Foreign Assistance Act Amendments of 1975.

AMENDMENT NO. 903

At the request of Mr. ROBERT C. BYRD, the Senator from South Carolina (Mr. THURMOND) was added as a cosponsor of amendment No. 903, proposed by him (for himself and others) to the amendment of the Senator from Pennsylvania (Mr. HUGH SCOTT, for himself

and others) to the bill (H.R. 8069) making appropriations for the Departments of Labor, and Health, Education, and Welfare, and related agencies, for the fiscal year ending June 30, 1976, and the period ending September 30, 1976, and for other purposes.

ORDER FOR STAR PRINT—SENATE RESOLUTION 256

Mr. KENNEDY. Mr. President, because of a typographical error in printing, I ask unanimous consent that a Star Print be made of Senate Resolution 256, the Senate resolution I submitted in support of the people of Portugal.

NOTICE OF GOVERNMENT OPERATIONS COMMITTEE MARKUP ON S. 957, TO AMEND THE INTERGOVERNMENTAL PERSONNEL ACT OF 1970

Mr. RIBICOFF. Mr. President, I wish to announce a markup by the Government Operations Committee on S. 957, which amends the Intergovernmental Personnel Act of 1970 to improve personnel administration in State and local governments.

The markup will be on Wednesday, October 1, at 10 a.m. in room 3302, Dirksen Senate Office Building. Other committee business may also be considered.

NOTICE OF HEARINGS

Mr. LEAHY. Mr. President, the Subcommittee on Environment, Soil Conservation, and Forestry of the Senate Agriculture Committee will hold hearings on S. 2308 in Bristol, Vt., on September 28, 1975, from 7:30 p.m. to 9:30 p.m. and on September 29, from 8 a.m. to 3:30 p.m.

This proposed legislation would revise the boundaries of the Bristol Cliffs Wilderness Area and is of great interest to the residents of the Bristol area. I want to thank Senator TALMADGE, chairman of the committee, for his cooperation in permitting this unusual Sunday hearing which will permit property owners who could not otherwise do so to testify before the subcommittee.

ADDITIONAL STATEMENTS

DEVELOPMENT OF U.S. NUCLEAR POWER POTENTIAL

Mr. STEVENS. Mr. President, on September 18, 1975, Senator HOWARD BAKER from Tennessee addressed the American Nuclear Society Executive Conference on Nuclear Legislation. As we are all aware, Mr. BAKER, as a member of the Joint Committee on Atomic Energy, has developed considerable expertise in this field.

In this address Mr. BAKER focused on the need for a sensible development of the U.S. nuclear power potential as the best means to decrease our dependence on the dwindling supply of petroleum products. He discussed the safety aspects of nuclear power and urged that all incidents regarding nuclear energy be discussed with all the facts known. When mistakes are made Mr. BAKER has urged that they be examined and the necessary steps be taken to make sure they do not occur again. Mr. BAKER also charted a course urging the cooperation of both the public and the private sectors to develop an abundant, safe source of nuclear energy.

Mr. President, I ask unanimous consent that this address be printed in the RECORD.

There being no objection, the address was ordered to be printed in the RECORD, as follows:

"AS TIME GOES BY"

(By Senator Howard H. Baker, Jr.)

Tonight I would like to focus my remarks on what I believe are some of the major problems and opportunities of the nuclear power program. I will also review the status of several bills before the Joint Committee on Atomic Energy, and suggest additional areas where legislative solutions or partial solutions may be needed to help the industry.

In the movie "Casablanca," Humphrey Bogart's piano playing friend played a famous song which included the words "the fundamental things apply as time goes by." Although the song was referring to items of a somewhat more esoteric nature than nuclear power, the thought can be applied almost as well to an overview of the nuclear world today. Let's look at some "fundamental things" relative to nuclear power and see how they have changed or remained constant with time.

NUCLEAR POWER GROWTH

In less than two decades we have seen nuclear power grow from an experimental energy source to a system that now provides that 8% of the nation's electrical needs. In some regions of the country, such as New England, the percentage of electricity generated by nuclear power is in the 30% range. This remarkable growth is due in part to the Power Demonstration Reactor Program, a cooperative venture of the Atomic Energy Commission and the civilian nuclear industry, strongly supported by the Joint Committee on Atomic Energy. It is a tribute to this cooperation that as of August 1st of this year, there were 54 nuclear power plants licensed to operate, and another 187 plants under construction, ordered or announced. By 1985 about 200 nuclear power plants should be in operation. By the year 2000 the figure may rise to 800.

It is particularly important at this time to underscore the fact that the use of nuclear power can significantly reduce the amount of *oil* this country consumes—much of which must now be imported. A recent survey by the *Public Utility Fortnightly* indicated that power from the atom in 1974 saved about one-quarter of a billion barrels of oil which might otherwise have had to be imported. By 1985, this saving should increase to about 2.4 billion barrels of oil per year—which is about the amount the U.S. is presently importing. Clearly, the role of nuclear power in our economy is changing "as time goes by."

NUCLEAR POWER SAFETY

One fundamental thing that has not changed, however, since the inception of civilian nuclear power is the devotion to safety by all involved. No one has ever been killed or injured in a nuclear accident at a commercial power plant. I won't take the time to dwell in detail on the measures that are employed to assure the safety of these plants, but they include research and development programs to identify potential safety problems and to find suitable solutions before accidents happen. Also included are the application of sound engineering standards and quality assurance procedures in reactor design, construction and operation; the use of engineered safety features to prevent the occurrence of accidents or to limit their effects in the highly unlikely event that an accident should occur; and the imposition of comprehensive technical reviews of all factors affecting plant design and safety.

Let's take a few moments to examine how these safety measures work out in practice by examining two incidents that occurred earlier this year. In one, which illustrates the operation of the inspection function noted above, the Nuclear Regulatory Commission took the position that there was concern about the safety of piping in the twenty-three operating boiling water reactors, as a result of defects found in several reactors. A directive was issued by the NRC that the piping in these reactors be inspected within 20 days. This action resulted in some curtailment in operation or temporary shutdown of several reactors. Detailed inspections were made, minor problems were uncovered and repaired, and the reactors were then put back into operation. The Joint Committee on Atomic Energy held a hearing on this subject, which served to assure the public that the situation and questions raised by it were properly aired.

In a more recent incident, a fire occurred on March 22, 1975, at the Browns Ferry Nuclear Plant located near Decatur, Alabama. As most of you know, the Joint Committee held a hearing on the circumstances and implications of this fire just two days ago. There are a few points worth emphasizing in relation to this important occurrence.

Because of the fire, all normally used shutdown cooling systems and other components which comprise the emergency core cooling system (ECCS) for Unit 1 were inoperable for several hours. The ability to monitor certain important components was also lost due to damage to about 2000 electrical cables in Units 1 and 2. A serious incident? Certainly. Extensive monetary damage? Yes. But it is important to note that failure or inoperability of the ECCS alone is not the equivalent of having a reactor "accident." The ECCS is designed to accommodate a pipe break accident, and no such event occurred. While some normally used shutdown cooling systems were also inoperative, plant operators were able to provide alternate means to cool the reactors. The important point is that duplicative and redundant systems were available, and successfully used. Such is what nuclear reactor safety demands. Both Unit 1 and 2 cores remained adequately cooled throughout the fire.

While the fire was costly, and the Joint Committee public hearing Tuesday showed that there is need for improving practices and procedures to prevent such an occurrence, I believe that this important accident showed that nuclear power plants indeed have a large margin of safety built into them.

PUBLIC RELATIONS

Every incident that occurs, however, no matter how large or small, contributes to the public relations problem that has haunted the peace-time nuclear industry from its inception. Too many have blindly assumed that since nuclear-release accidents have never occurred, the public would readily accept atomic energy sources. While acceptance has come on a widespread scale, so have serious doubts based on a couple of occurences.

First, nuclear energy was presented to the world in 1945 as a weapon of destruction. We first saw it as an awesome military weapon, and that stigma remains yet with us.

Second, the nuclear industry, it seems to me, did not present its initial case for nuclear power as a panacea for all our energy problems were overly optimistic at the very least. There was also a tendency within the nuclear community to regard those who questioned the fledgling nuclear programs as infidels.